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IN THE
COURT OF APPEALS OF INDIANA

WALTER ARCHER, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1001-CR-32
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0801-FC-3

October 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Walter Archer, III, appeals his two convictions for Class C felony carrying a handgun without a license. We affirm.

Issues

The issues before us are:

I. whether the State presented sufficient evidence to sustain Archer's two convictions for class C felony carrying a handgun without a license; and

II. whether Archer's two convictions of class C felony carrying a handgun without a license violate the double jeopardy clause of the Indiana Constitution.

Facts

On January 1, 2008, Corporal Martin Mullins of the South Bend Police Department was on patrol. At around 5:40 a.m. he was stopped at a traffic light when he noticed a grey four-door Chevy Caprice. The car matched the description of a stolen vehicle, although it later turned out that this vehicle was not the one reported stolen. Corporal Mullins followed the vehicle to a gas station, and Archer, the sole occupant of the car, got out of the vehicle and entered the store.

Corporal Mullins discovered that the vehicle's license plate number did not match the vehicle and pulled his car behind the Caprice. Archer came out of the store and pumped gas into the vehicle. After Archer finished pumping the gas, he approached Corporal Mullins. The officer got out of his vehicle and requested Archer's driver's license. Archer produced an identification card with his thumb covering the photograph

and name on the card. Archer then put the identification card back into his pocket and began to run away. Corporal Mullins ordered Archer to stop, but Archer did not comply.

Corporal Mullins pursued Archer on foot. The officer twice attempted to use his taser gun, tackled Archer, and grabbed his arm in an attempt to stop him. Archer was able to get away each time, once because he struck the officer in his left eye. Archer took refuge in an abandoned house. He was finally apprehended after being tased a third time, but Archer continued to resist until he was placed in handcuffs.

As Archer was fleeing from Corporal Mullins, Officer Jose Capeles responded to Corporal Mullins's request for assistance and arrived at the gas station. Officer Capeles observed Corporal Mullins's car parked behind the Caprice. Officer Capeles used a flashlight to look into the vehicle. He observed the butt of a Smith & Wesson handgun protruding from under the driver's seat. As Officer Capeles was taking photographs of the Smith & Wesson, he observed a second gun, a black and brown Browning Arms 9mm, under the same seat. Both handguns were loaded.

On January 3, 2008, the State charged Archer with seven counts: counts I and II, resisting law enforcement as Class A misdemeanors; count III, battery to a law enforcement officer as a Class D felony; counts IV and V, carrying a handgun without a license as Class A misdemeanors; and counts VI and VII, felon in possession of a handgun as Class C felonies. On January 20, 2009, a jury found Archer guilty of counts I and II, but could not reach a verdict as to counts III, IV, and V. On December 1, 2009, Archer's second jury trial on counts III, IV, and V began. The jury returned a verdict of

guilty on all counts. Archer now appeals only his two convictions for carrying a handgun without a license as Class A misdemeanors.

Analysis

I. Sufficiency of the Evidence

Archer argues that his conviction should be overturned because the State did not present evidence sufficient to prove that he had constructive possession of the two handguns found in the Caprice. Archer also argues that the vehicle was not owned by him; that he fled the scene because he believed there was an outstanding warrant for his arrest, not because the handguns were in the car; and that the handgun protruding from underneath the driver's seat was only visible with the aid of the flashlight. This evidence, Archer asserts, was insufficient to show that he had constructive possession of the handguns.

When reviewing a claim of insufficient evidence, we neither reweigh evidence nor judge the credibility of witnesses. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). Only evidence favorable to the judgment is considered, along with the reasonable inferences drawn therefrom, to determine if there was sufficient evidence of probative value to support a conviction. Id. We will affirm the conviction if a reasonable trier of fact, using the reasonable inferences drawn from the evidence, could have concluded that the defendant was guilty of the crime charged beyond a reasonable doubt. Id.

Archer was convicted of possession of a handgun under the following statute: "[A] person shall not carry a handgun in any vehicle or on or about the person's body,

except in the person's dwelling, on the person's property or fixed place of business, without a license issued under this chapter being in the person's possession." Ind. Code § 35-47-2-1(a). In order for a person to be convicted under this statute, the State must prove that a defendant had actual or constructive possession of a handgun. Grim, 797 N.E.2d at 831. Actual possession is the direct physical control of the gun. Bradshaw v. State, 818 N.E.2d 59, 62 (Ind. Ct. App. 2004). Constructive possession includes both the intent and capability to maintain control and dominion over the handgun. Id. at 62-63.

In order to show intent, the State must prove the defendant had actual knowledge of the presence of the gun. Grim, 797 N.E.2d at 831. Actual knowledge may be inferred from the fact that the defendant had exclusive dominion and control over the premises where the contraband was located. Id. at 831 (quoting Woods v. State, 471 N.E.2d 691, 694 (Ind. 1984)). Further, exclusive possession, not ownership, of the premises in which the contraband was found is determinative. Whitney v. State, 726 N.E.2d 823, 826 (Ind. Ct. App. 2000) (citing Goliday v. State, 708 N.E2d 4, 6 (Ind. 1999)).

Proof of the capability to maintain dominion and control can be shown by: "(1) incriminating statements made by a defendant; (2) attempted flight or furtive gestures; (3) proximity of contraband to the defendant; (4) location of the contraband within the defendant's plain view; or (5) the mingling of the contraband with other items owned by the defendant." Bradshaw, 818 N.E.2d at 63 (citing Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999)).

It was reasonable for the jury to infer, based on the evidence, that Archer had knowledge of the presence of the handguns. The State presented evidence that Archer had exclusive possession of the car. Archer argues that because he only had possession of the vehicle for a short time[1] that it was unreasonable for the jury to infer his knowledge of the handguns. In Goliday, drugs were found in the trunk of the car the defendant was driving. Goliday, 708 N.E.2d at 4. The defendant argued that, because he borrowed the car, he was not in exclusive possession of the vehicle. Id. at 6. The court dismissed this argument and noted that the issue "is not ownership but possession." Id. The court found that because defendant had exclusive possession of the vehicle at the time he was pulled over, this was sufficient to infer actual knowledge of the drugs. Id.

Similarly, the evidence here is that Archer had exclusive possession of the car when Officer Mullins attempted to arrest him. Based on this evidence, the jury reasonably could have found Archer had actual knowledge of the presence of the handguns in the vehicle. In order to decide to the contrary, we would have to reweigh the evidence, which we refuse to do.

The State also presented ample evidence showing Archer's dominion and control over the handguns based on the factors in Bradshaw, 818 N.E.2d at 63. First, the guns were found in close proximity to where Archer was sitting in the vehicle. Second, Archer

[1] Specifically, Archer testified that he only had possession of the vehicle from 4:00 a.m. until the time of the incident, which occurred around 5:40 a.m. Archer's girlfriend's brother and his girlfriend's baby's father also drove the vehicle. Tr. pp. 624-32. A jury, however, is free to disbelieve any witness's testimony. See Thompson v. State, 804 N.E.2d 1146, 1149 (Ind. 2004).

fled the scene and resisted arrest. Finally, one handgun was found within plain view with the aid of a flashlight. Archer argues that the gun was not in plain sight because the officer had to use a flashlight to view it. The arrest took place at 5:40 a.m. Simply because it was dark inside the vehicle due to the early hour does not change the fact that the gun was in plain view. The jury reasonably could have concluded, based on these factors, that Archer had dominion and control over the handguns. There is sufficient evidence to support Archer's convictions.

II. Double Jeopardy

Archer also argues that his two convictions for carrying a handgun without a license constitute a double jeopardy violation and, therefore, one of the convictions should be vacated. Article I, Section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." Determining whether or not Archer's convictions constitute a double jeopardy violation presents an issue of law, which we review de novo. Taylor v. State, 929 N.E.2d 912, 920 (Ind. Ct. App. 2010), trans. denied.

Archer was charged and convicted of two counts of carrying a handgun without a license; each count corresponded to a different handgun. Archer argues that a violation of Indiana's double jeopardy clause occurred because the crimes were charged under the same statute, Indiana Code Section 35-47-2-1, the essential elements for both crimes were the same, and the State used the same evidence to convict Archer under both counts. Archer's arguments are without merit.

Indiana's double jeopardy clause protects defendants from being convicted twice by the State for the same crime. Richardson v. State, 717 N.E.2d 32, 37 (Ind. 1999). A double jeopardy violation occurs "if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Id. at 49. In other words, a defendant's right to be free from double jeopardy is violated when one of the two tests, the statutory elements test or the actual evidence test, is satisfied. Id.

First, the statutory elements test requires a comparison of "the essential statutory elements of one charged offense with the essential statutory elements of the other charged offense." Id. We have explained that:

> [L]egislative intent in enacting a statute is the key consideration when determining whether the double jeopardy clause protects against multiple punishments for the same offense under a particular statute. Specifically, the whole point of whether multiple offenses of the same statute are committed during a single transaction focuses on the definition of the crime involved. Thus, the touchstone of whether the double jeopardy clause is violated is the legislature's articulated intent.

Brown v. State, 912 N.E.2d 881, 893 (Ind. Ct. App. 2009), trans. denied, (quoting Robinson v. State, 835 N.E.2d 518, 521 (Ind. Ct. App. 2005)). We must, therefore, examine Indiana Code Section 35-47-2-1 to determine whether the legislature intended for the State to be able to charge a defendant with multiple counts of carrying a handgun without a license in a scenario like Archer's.

In Taylor, this court determined that multiple convictions for unlawful possession of a firearm as a serious violent felon did not violate Indiana's double jeopardy clause. Taylor, 929 N.E.2d at 922. Each count corresponded with a different firearm found at the defendant's house. The defendant argued on appeal that these convictions violated Indiana's prohibition against double jeopardy.

In Taylor, the statute at issue was Indiana Code Section 35-47-4-5(c), which states that "[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon." We reasoned that the legislature's use of the singular form of "possesses a firearm," as opposed to the plural "possesses firearms," indicates that the offense refers to the possession of a single weapon. Taylor, 929 N.E.2d at 921. Therefore, this court concluded that, based on the plain and ordinary meaning of the words, the legislature's intent "was to make each unlawful possession of one firearm . . . a separate and independent crime." Id. at 921. See also Brown, 912 N.E.2d at 894-95 (holding that Indiana's child pornography and child exploitation statutes refer to the possession of singular objects—"a photograph" and "any book," for example—which indicate the legislature intended to criminalize the possession of each individual photograph, book, or other object).

Here, our conclusion is the same as it was in Taylor. Archer was charged under Indiana Code Section 35-47-2-1, which prohibits a person from carrying "a handgun . . . without a license." (emphasis added). The legislature used the term "carry a handgun" as opposed to "carrying handguns" to indicate their intent to criminalize the possession of

a single handgun. See Taylor, 929 N.E.2d at 921. Archer was found in possession of two separate handguns, and, we conclude the legislature intended that the State be allowed to charge Archer with two separate crimes. Archer's convictions were based on his possession of those two distinct handguns. Therefore, Archer's convictions do not violate the statutory elements test under Indiana's double jeopardy clause.

Next, we turn to the analysis under the actual evidence test. Here, "the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts." Richardson, 717 N.E.2d at 53. In other words, the exact same evidence used to prove the essential elements of one crime must also be used to prove all of the essential elements of the second crime. See Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). To determine which facts were used to prove each crime, we must evaluate the evidence from the jury's perspective and we may consider the charging information, final jury instructions, and arguments made by counsel. Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

The State charged Archer with two counts of unlawful carrying of a handgun. Count IV was for carrying the 9mm Smith & Wesson and count V was for carrying the 9mm Browning Arms. The jury instructions also distinguished between the two handguns. The prosecutor distinguished between the two handguns during his closing statement. The jury was aware that there were two distinct guns, each relating to a different charge. Therefore, we find that the same evidence was not used to prove the essential elements of both crimes.

Because neither the statutory elements test nor the actual evidence test was violated in this case, we hold that Archer's two convictions for carrying a handgun without a license do not constitute the "same offense" under Indiana's double jeopardy clause.

Conclusion

There was sufficient evidence to support Archer's convictions, and Archer's two convictions for carrying a handgun without a license do not violate Indiana's double jeopardy clause. We affirm.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.